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IN THE
COURT OF APPEALS OF INDIANA

FRANCIS W. SPLITTORFF,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 63A01-0606-CV-254
	)	
JERRY AIGNER, PAM AIGNER, and BEVERLY CHILDS, and WARRICK COUNTY,	)	
	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE PIKE CIRCUIT COURT
The Honorable Jeffrey Biesterveld, Judge
Cause No. 63C01-0404-PL-105

April 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Francis Splittorff appeals the trial court's grant of summary judgment in favor of Jerry and Pam Aigner and Beverly Childs (collectively "the Aigners") and Warrick County ("the County"). We affirm.

Issue

We address the dispositive issue, which is whether Splittorff's challenge to the issuance of the tax deed was timely.

Facts

In the mid-1980's Splittorff agreed to purchase a parcel of property on Jenner Road in Chandler from Lois Brooks on contract. Splittorff did not receive the tax bills for 1999, 2000, or 2001, which were mailed to Brooks in Missouri, the record titleholder of the property. On August 7, 2000, Splittorff filled out an "Address Correction Request" listing Brooks as the name on the property record and indicating that the correct addressee was Splittorff or Brooks and that the correct address was the Jenner Road address. App. p. 167. The form included a line for the "Owners Signature," which was left blank. Id. That same day, Splittorff redeemed the property from a 1999 tax sale by paying $624.50.

On May 21, 2001, a general warranty deed, issued on May 17, 2001, from Brooks to Splittorff was recorded. On August 15, 2001, a letter postmarked July 27, 2001, and sent certified mail from the County Auditor's office to the Jenner Road address was returned as "unclaimed." Appellee County's App. p. 6. On August 31, 2001, an application for judgment and order of sale was filed with the trial court, and on

September 18, 2001, it issued a judgment and order of sale. On September 26, 2001, the Aigners purchased the property in a tax sale. On June 25, 2002, the Aigners sent to Splittorff at the Jenner Road Address, via certified mail, a notice of sale and expiration of redemption period. This notice indicated that the redemption period expired on September 27, 2002, and that a petition for tax deed would be filed on or after that date. On August 27, 2002, the Aigners petitioned for a tax deed, and notice of such was again sent to Splittorff. The trial court set the matter for a hearing on October 1, 2002, and issued a notice of the hearing to Splittorff. On October 1, 2002, and December 4, 2002, the trial court issued orders for tax deed.[1] The actual deed was issued on October 8, 2002, and was recorded on September 19, 2003.

On December 4, 2003, the Aigners filed a complaint to quiet title in the property, naming Splittorff and the County as defendants. On January 28, 2004, Splittorff filed an answer, affirmative defenses, a counterclaim, and a crossclaim. In response to Splittorff's crossclaim, the County filed a partial motion for summary judgment. Splittorff then filed an amended crossclaim, which the County answered. Splittorff responded to the County's partial motion for summary judgment. The County replied and eventually filed a second motion for summary judgment on Splittorff's amended crossclaim. On March 2, 2006 Splittorff again responded and moved for summary judgment. The County replied. On March 22, 2006, the Aigners filed a motion for

[1] It is unclear why the trial court issued two orders for tax deed.

summary judgment. After a hearing on all of the pending motions, the trial court granted the County's and the Aigners' motions for summary judgment. Splittorff now appeals.

Analysis

On appeal from the grant of summary judgment, we face the same issues that were before the trial court and follow the same process. Schaefer v. Kumar, 804 N.E.2d 184, 191 (Ind. Ct. App. 2004), trans. denied. Summary judgment is appropriate only where the designated evidence shows there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Id.; Ind. Trial Rule 56(C). "A genuine issue of material fact exists where facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue." Schaefer, 804 N.E.2d at 191.

On appeal, we consider only the matters designated to the trial court. Id. We do not reweigh the evidence, and we liberally construe all designated evidence in the light most favorable to the nonmoving party. Id. "A grant of summary judgment may be affirmed on any theory supported by the designated materials." [2] Id.

We have summarized the tax sale procedures as follows:

> If an owner of real estate fails to pay the property taxes, the property may be sold to satisfy the tax obligation. The tax sale process is a purely statutory creation and requires material compliance with each step of the governing statutes .

[2] Splittorff argues, "As a result of the trial court's failure to make any findings of fact or conclusions of law in support of its ruling, Splittorff is left with the onerous task of stabbing around in the dark to try to discern the reasons underlying the Trial Court's decision." Appellant's Br. p. 14. We remind, him however, that if a trial court enters findings and conclusions on summary judgment they only aid in our review; they are not binding on us. See Walker v. Employers Ins. of Wausau, 846 N.E.2d 1098, 1101 (Ind. Ct. App. 2006).

> . . . The issuance of a tax deed creates a presumption that a tax sale and all of the steps leading up to the issuance of the tax deed are proper. However, this presumption may be rebutted by affirmative evidence to the contrary. . . .

Id. (citations and footnote omitted).

The tax sale statues provide specific limitations on a property owner's ability to challenge a tax deed. Indiana Code Section 6-1.1-25-16 provides:

> A person may, upon appeal, defeat the title conveyed by a tax deed executed under this chapter only if:
>
> > (1) the tract or real property described in the deed was not subject to the taxes for which it was sold;
> >
> > (2) the delinquent taxes or special assessments for which the tract or real property was sold were paid before the sale;
> >
> > (3) the tract or real property was not assessed for the taxes and special assessments for which it was sold;
> >
> > (4) the tract or real property was redeemed before the expiration of the period of redemption (as specified in section 4 of this chapter);
> >
> > (5) the proper county officers issued a certificate, within the time limited by law for paying taxes or for redeeming the tract or real property, which states either that no taxes were due at the time the sale was made or that the tract or real property was not subject to taxation;
> >
> > (6) the description of the tract or real property was so imperfect as to fail to describe it with reasonable certainty; or
> >
> > (7) the notices required by IC 6-1.1-24-2, IC 6-1.1-24-4, and sections 4.5 and 4.6 of this chapter were not in substantial compliance with the manner prescribed in those sections.

Further, "A tax deed issued under this section is incontestable except by appeal from the order of the court directing the county auditor to issue the tax deed filed not later than sixty (60) days after the date of the court's order." Ind. Code § 6-1.1-25-4.6(h) (emphasis added). We believe that the legislature, in its efforts to allow counties to collect unpaid taxes, enacted these statutes with the intent of limiting the bases and time for challenging a tax deed so as to strike a balance between encouraging buyers to purchase property in tax sales and protecting the property owner's rights.

The sixty-days language in Indiana Code Section 6-1.1-25-4.6(h) became effective on July 1, 2001. P.L. 139-2001. Without discussion as to why we should consider the case as pending prior to the August 31, 2001 application for judgment and order of sale, Splittorff asserts that the amended language cannot be applied "to the then pending proceeding." Appellant's Reply Br. p. 16. Even assuming that proper notice was given at least twenty-one days before the August 31, 2001 application,[3] see I.C. § 6-1.1-24-4, based on the record and arguments before us, we are unconvinced that this action was pending when the sixty-day-limit became effective on July 1, 2001. Thus, we believe the legislature intended to limit a person's ability to challenge a tax sale based on the deficiencies enumerated in Indiana Code Section 6-1.1-25-16 to sixty days after the trial court's issuance of a tax deed. See I.C. § 6-1.1-25-4.6(h).

[3] We do not have the chronological case summary ("CCS") for the issuance of the tax deed, only the subsequent quiet title action filed by the Aigners.

To the extent that Splittorff's challenges to the assessment of taxes and notice given fall under the deficiencies enumerated in Indiana Code Section 6-1.1-25-16, his claims are precluded because he did not challenge the issuance of deed within sixty days. Splittorff, however, attempts to circumvent this limit by claiming the tax deed is "null and void."[4] Appellant's Br. p. 15.

Other than an occasional passing reference to "jurisdiction," we initially note Splittorff has not specifically alleged that the trial court was without either personal jurisdiction or subject matter jurisdiction to issue the tax deed. See Appellant's Br. pp. 8,11. Whether taxes were properly assessed and notice was adequate is a different question from the trial court's exercise of personal or subject matter jurisdiction. See, e.g., Tax Certificate Invs., Inc. v. Smethers, 714 N.E.2d 131, 133 n.2 (Ind. 1999) ("As noted by the Indiana Court of Appeals in its opinion, it is adequacy of notice and not personal jurisdiction that is the proper focus of this inquiry."); Indiana State Bd. of Health Facility Adm'rs v. Werner, 841 N.E.2d 1196, 1205 (Ind. Ct. App. 2005) (observing that subject matter jurisdiction involves the power of a court to decide particular kinds of cases and depends neither on the intricacies of the pleadings nor the correctness of any decision made by a court), trans. denied; see also I.C. § 6-1.1-24-4.7(f) ("The court that enters judgment under this section shall retain exclusive continuing supervisory jurisdiction over all matters and claims relating to the tax sale.").

[4] Splittorff argues, "Appellant's make much ado over the fact that Splittorff did not file any 'appeal' of the Trial Court that issued the order for tax deed, however there was nothing from which to appeal as the purported order for issuance of the tax deed was void ab initio." Appellant's Reply Br. pp. 13-14. Because Splittorff does not support this assertion with citation to authority, it is waived. See Ind. Appellate Rule 46(A)(8)(a).

Further, the case upon which Splittorff relies for his general assertion that void judgments can be attacked at anytime referred to a challenge to the trial court's subject matter jurisdiction. See Bowyer Excavating, Inc. v. Commissioner, Indiana Dep't of Envtl. Mgmt., 671 N.E.2d 180, 183-84 (Ind. Ct. App. 1996) ("The absence of subject matter jurisdiction renders a judgment void. Void judgments can be attacked directly or collaterally at any time." (citation omitted)), trans. denied. Splittorff's general assertion that the judgment is void is not enough to constitute a challenge to the trial court's subject matter or personal jurisdiction.

As to the adequacy of the notice, in the past we have said that a tax deed alleged to be void might be challenged in a Trial Rule 60(B) motion. See, e.g., Diversified Invs., LLC. v. US Bank, NA, 838 N.E.2d 536, 544-45 (Ind. Ct. App. 2005), trans. denied. Although Splittorff did not specifically file a Trial Rule 60(B) motion, for argument's sake, we consider his counterclaim and crossclaim as such. We will also entertain his argument that a Trial Rule 60(B)(6) motion can be made at a reasonable time and is not limited to the sixty days set out in Indiana Code Section 6-1.1-25-4.6(h). But see B P Amoco Corp. v. Szymanski, 808 N.E.2d 683, 690 (Ind. Ct. App. 2004) ("Since an appeal to a tax deed can be filed through either an independent action or a motion pursuant to T.R. 60(B), both remedies are subject to the same sixty-day time frame as stipulated in the current I.C. 6-1.1-25-4.6(h)[.]"), trans. denied, compared with Diversified, 838 N.E.2d at 545 (concluding an exception to the sixty-day limit "exists where a motion for relief from judgment alleges a tax deed is void due to constitutionally inadequate notice, in

which case an appeal must be brought within a reasonable time rather than within sixty days.").

The determination of what constitutes a reasonable time for Trial Rule 60(B) motions varies with the circumstances of each case. Kessen v. Graft, 694 N.E.2d 317, 321 (Ind. Ct. App. 1998), trans. denied. "Relevant to the question of timeliness is prejudice to the party opposing the motion and the basis for the moving party's delay." Id.

Here, the tax deed was issued on October 8, 2002, and Splittorff filed his counterclaim and crossclaim on January 28, 2004. This was the first challenge to the issuance of the tax deed. During his deposition, Splittorff was asked whether he recalled receiving a notification about a tax sale from the Aigners' attorney's office. Splittorff stated that he remembered receiving a letter with the Aigners' attorney's office return address but did not recall the contents. He also admitted that he signed a certified mail card on June 25, 2002, and that it was "a possibility' that on that day he received a notice of sale and expiration of period of redemption. Appellant's App. p. 223. Moreover, in his first affidavit Splittorff swore that he had previously redeemed the property in 2000, showing his familiarity with the redemption process. Further, he stated that around the time of the 2001 tax sale someone from the Warrick County Treasurer's Office left a message on his answering machine "indicating that the taxes for the subject property had been paid and she was not certain where the tax bills had been sent." Appellant's App. p. 72.

Also, on September 19, 2003, Splittorff paid $10,500 to the auditor in an effort to redeem the mobile home that he placed on the property and that was sold in a separate tax sale proceeding. This was approximately two and half months before the Aigners filed their quiet title action and more than four months prior to Splittorff filing his counterclaim and crossclaim.

Although Splittorff challenges the adequacy and accuracy of the notices, he does not claim that he was not notified of the sale, redemption period, application for deed, hearing on the application, or the issuance of the deed. Further, Splittorff offers no explanation for his lengthy delay in challenging the tax deed. These factors taken together lead us to the conclusion that waiting until January 28, 2004, was not a reasonable time in which to challenge the 2002 issuance of a tax deed.

Splittorff also appears to argue that Indiana Trial Rule 13(J) gave him unlimited time to challenge the tax deed because it was done in response to the Aigners' quiet title action. Indiana Trial Rule 13(J) provides in part:

> Effect of statute of limitations and other discharges at law. The statute of limitations, a nonclaim statute or other discharge at law shall not bar a claim asserted as a counterclaim to the extent that:
>
> > (1) it diminishes or defeats the opposing party's claim if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim, or if it could have been asserted as a counterclaim to the opposing party's claim before it (the counterclaim) was barred;

We simply cannot accept Splittorff's argument. Indiana Trial Rule 60(B)(6) specifically limits the ability to set aside a void judgment to a "reasonable" time.

According to Splittorff's argument, Trial Rule 13(J) would allow unlimited time to move to set aside a judgment as long as it is done in the form of a counterclaim. This interpretation renders the time limits in Trial Rule 60(B) meaningless and would extend a claim to counterclaimants that would not otherwise be available to the same individual filing a direct claim as a plaintiff. We do not believe our supreme court intended such a result when it enacted the Trial Rules.

Further, a motion for relief from judgment under Trial Rule 60(B) is addressed to the equitable discretion of the trial court. Fairrow v. Fairrow, 559 N.E.2d 597, 599 (Ind. 1990). Without more, we are not convinced that the denial of relief under Trial Rule 60(B) because relief was not sought in a reasonable time based on the specific circumstances of the case is the equivalent of a "statute of limitations, a nonclaim statute or other discharge at law[.]" T.R. 13(J) (emphasis added). Indiana Trial Rule 13(J) does not offer Splittorff an unlimited time to challenge the tax deed.

In sum, because Splittorff's challenge to the issuance of the tax deed was untimely, he has not established that it was improperly issued. Therefore, he has also not established a basis for his 42 U.S.C. §1983, 42 U.S.C. § 1998, and takings claims. Accordingly, the trial court properly granted the County's and the Aigners' motions for summary judgment.[5]

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[5] Splittorff also makes several challenges to the summary judgment procedure. First, because our decision is not based on the contents of Jerry Aigner's affidavit we need not determine whether, as Splittorff asserts, it was made without personal knowledge. Second, to the extent that evidence was not properly designated in the County's second motion for summary judgment, Splittorff does not assert how his substantial rights were affected by the County's subsequent supplemental designation of material evidence on March 27, 2006. See T.R. 61 ("The court at every stage of the proceeding must disregard

Conclusion

Because Splittorff's challenge to the issuance of a tax deed was not timely, the trial court properly granted the County's and the Aigners' motions for summary judgment. We affirm.

Affirmed.

BAILEY, J., and VAIDIK, J., concur.

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any error or defect in the proceeding which does not affect the substantial rights of the parties."). Finally, Splittorff contends that the Aigners did not respond at all to his motion for summary judgment and the County's response was inadequate to answer Splittorff's claims. Splittorff asserts that he is therefore entitled to summary judgment. Trial Rule 56(C) provides, "Summary judgment shall not be granted as of course because the opposing party fails to offer affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court." Thus, the mere fact that the County and the Aigners did not respond to Splittorff's motion, as he asserts, does not entitle Splittorff to summary judgment. This is especially true, here, where both the County and the Aigners moved for summary judgment and designated evidence in support of such.